



UNITED STATES DEPARTMENT OF COMMERCE
Patent and Trademark Office
ASSISTANT SECRETARY AND COMMISSIONER
OF PATENTS AND TRADEMARKS
Washington, D.C. 20231

#17

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In re Application of :
Arthur R. Hair :
Serial No. 07/586,391 : DECISION ON PETITION
Deposited: September 18, 1990 :
For: TRANSMISSION SYSTEM :

The above-identified application has been referred to the Office of the Assistant Commissioner for Patents for consideration of the petition filed on December 17, 1990, requesting that the application be accorded a filing date of September 14, 1990, instead of September 18, 1990.

On October 31, 1990, Application Branch mailed a Notice of Improper FWC filing under 37 CFR 1.62 stating that the original filing receipt was mailed in error and that this was an improper filing under 37 CFR 1.62 since the request for a FWC application was deposited after the parent application became abandoned.

In response, the present petition was filed wherein petitioner alleges that the request for a FWC application of the prior application was mailed to the Patent and Trademark Office (PTO) via "Express Mail" on September 14, 1990, and, therefore, the proper procedures under 37 CFR 1.62 were followed. The petition is accompanied by a photocopy of Express Mail customer receipt No. MB137703489, a verified statement of Tracey L. Milka, an employee of the law firm of Cohen & Grigsby and a postcard receipt for the above application having a Mail Room date stamp of September 18, 1990.

A review of this application file reveals that the papers allegedly deposited on September 14, 1990, have a certificate of mailing by Express Mail, including an Express Mail label number and deposit date. The certificate of mailing by Express Mail indicates the date of deposit to be September 14, 1990.

The copy of the Express Mail customer receipt submitted with the petition and the copy of the Express Mail label retained by the PTO, bear a "Date-in" of September 18, 1990, literally "9 18 90." The copy of the Express Mail customer receipt, the Express Mail label retained by the PTO and the certificate of mailing by Express Mail all bear the same label number.

Paragraph (c) of 37 CFR 1.10 states that:

"the...Office will accept the certificate of mailing by 'Express Mail' and accord the paper or fee the certificate date under 35 U.S.C. 21(a)...without further proof of the date on which the mailing by 'Express Mail' occurred unless a question is present regarding the date of mailing."

Clearly, when the certificate of mailing by Express Mail contains one date and the Express Mail label contains another date there is a question "regarding the date of mailing." The certificate of mailing by Express Mail is not sufficient evidence by itself to establish the date of mailing.

37 CFR 1.10(a) indicates that papers or fees filed under the practice set forth in 37 CFR 1.10 will "be considered as having been filed in the Office on the date the paper or fee is shown to have been deposited as 'Express Mail' with the United States Postal Service." Therefore, in those cases where there is a discrepancy, the question is resolved by using the "Date-In" on the Express Mail receipt, which verifies when it was mailed via Express Mail." The date inserted on the Express Mail label by the Postal Service employee indicates that the application was filed after the abandonment of the prior application.

Petitioner has failed to provide any statement from the Postal Service indicating that the particular Express Mail package in question was incorrectly dated by the Postal Service.

Further, while the petition is accompanied by a verified statement of Tracey L. Milka averring to the fact that the mailing occurred on the date certified, the statement does not indicate whether the allegations contained therein are based upon personal remembrance of the circumstances surrounding the filing of the application because of some unusual circumstances, or whether the allegations are based upon some records, e.g., docket or log book, maintained by the law firm. If the statement is based upon law firm records, a copy of those records and explanation thereof in the form of a declaration is required. If the statement is based upon personal remembrance of the facts, a supplemental declaration is required which clearly indicates that fact and explains why facts regarding this particular application are remembered. Presumably many applications are handled in the

law firm such that specific dates and facts regarding a particular application would not be remembered unless there was something exceptional about the application or its processing.

The petition is denied.

If petitioner desires to prosecute this application, then appropriate steps must be taken pursuant to 37 CFR 1.137 to revive application Serial No. 07/206,497 to establish copendency between Serial No. 07/206,497 and the present application. Inquiries regarding petitions to revive should be directed to Petitions Information, Office of the Assistant Commissioner for Patents at (703) 557-4282.

The petition fee will not be refunded since it has not been shown to have been necessitated by Office error.

Any request for reconsideration of the above decision (no further petition fee is required) and any petition to revive directed to application Serial No. 07/206,497 should be filed within TWO MONTHS of the date of this decision to be considered timely filed and directed to the undersigned, Crystal Park Building 2, Room 919, Washington, D.C. 20231. Any petition to revive will be forwarded to the Office of the Deputy Assistant Commissioner for Patents for consideration.

Failure to timely file a petition will result in the return of this application to Application Branch for processing as an improperly filed application under 37 CFR 1.62-No Filing Date Granted.

C.E. Van Horn

Charles E. Van Horn
Patent Policy and Programs Administrator
Office of the A/C for Patents

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